In the Supreme Court

Appeal from the Wayne Circuit Court
Hon. Cynthia Diane Stephens

RONALD M. NASTAL and
IRENE NASTAL,

Plaintiffs-Appellees,

-vs-

Docket No. 125069

HENDERSON & ASSOCIATES INVESTIGATIONS, INC., a Michigan corporation;
NATHANIAL STOVALL; and
ANDREW CONLEY,

Defendants-Appellants.

BRIEF ON APPEAL OF PLAINTIFFS-APPELLEES

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STATEMENT OF QUESTIONS PRESENTED

I.

DID THE COURT OF APPEALS ERR IN HOLDING THAT PLAINTIFF HAD STATED A CLAIM FOR "STALKING" AS IT IS DEFINED IN MCL 750.411h?

Plaintiffs Ronald and Irene Nastal answer "NO."

Defendants Henderson & Associates, Nathanial Stovall and Andrew Conley would answer "YES."

The trial court would answer "NO."

The Court of Appeals answered "NO."

II.

DID THE COURT OF APPEALS ERR IN HOLDING THAT THERE WAS A QUESTION OF FACT AS TO WHETHER DEFENDANTS' CONDUCT WAS "LEGITIMATE ACTIVITY."?

Plaintiffs Ronald and Irene Nastal answer "NO."

Defendants Henderson & Associates, Nathanial Stovall and Andrew Conley would answer "YES."

The trial court would answer "NO."

The Court of Appeals answered "NO."

III.

IS DEFENDANTS' PUBLIC POLICY ARGUMENT PERSUASIVE?

Plaintiffs Ronald and Irene Nastal answer "NO."

Defendants Henderson & Associates, Nathanial Stovall and Andrew Conley would answer "YES."

The trial court would answer "NO."

The Court of Appeals answered "NO."

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STATEMENT OF BASIS OF JURISDICTION

Plaintiff-appellees ("plaintiffs") accept defendants-appellants' ("defendants") statement of the basis of this Court's jurisdiction insofar as it indicates that this Court granted defendants' application for leave to appeal from the October 23, 2003 decision of the Court of Appeals. (App, p 35a.)

Plaintiff strongly disagrees with defendants' mischaracterization of the Court of Appeals' opinion as holding that "a genuine issue of material fact as to the [legitimacy of the surveillance] arises whenever the surveillance activities are continued after a subject discovers that he is being followed." (Defendants' brief on appeal, p vi; emphasis original.) See discussion, *infra*.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff Ronald Nastal was injured in an automobile accident and sued a third party, who was insured by Citizens Insurance Company. Plaintiff suffered a head injury in the accident. Citizens employed Henderson & Associates to investigate plaintiff's claim, with the goal of minimizing Citizens' exposure. There were no allegations of fraud or malingering.

Henderson employees followed plaintiff on four separate occasions. On three of them, plaintiff immediately noticed that he was under surveillance and experienced great emotional distress. Plaintiff called the local police and twice confronted the investigators himself, but defendants resumed or continued the surveillance anyway. Plaintiff developed permanent emotional damage as a result of the surveillance and sued both Citizens and Henderson, alleging violations of the "stalking" statute and negligence in carrying out the surveillance. The trial court denied motions for summary disposition by both defendants; Citizens subsequently settled the claim against it and was dismissed. The Court of Appeals granted Henderson's request for leave to appeal, but affirmed the trial court in an unpublished opinion per curiam. This Court granted defendants' application for leave to appeal.

The Court of Appeals did not err in holding that plaintiff had stated a claim for "stalking" under MCL 750.411h. The statutory language is clear and there is no need to examine the Legislature's "intent" in enacting it. That other jurisdictions have incorporated statutory exemptions for certain private actors indicates only that the Michigan Legislature could have created such an exception but chose not to.

Plaintiff's claim satisfies the elements of "stalking" as it is defined in the statute. Defendants engaged in a willful course of conduct that constituted "harassment" and caused plaintiff to feel frightened, intimidated or threatened. A reasonable person in plaintiff's situation would feel "frightened," "harassed" or "threatened" by defendants' actions.

The Court of Appeals was correct in holding that the statutory exception for "legitimate activity" does not provide a basis for dismissing plaintiff's complaint. The actions of a private investigator are not always "legitimate" simply because they are performed by a private investigator. Private investigators can be liable for common law torts, such as invasion of privacy, even apart from the stalking statute, but common law remedies are not always adequate.

Defendants have mischaracterized the Court of Appeals' holding and Judge Stephens' ruling in the trial court. Neither court suggested that a cause of action for stalking arises simply because a private investigator's subject discovers he is being observed. "Stalking" requires a minimum of two noncontinuous episodes of unconsented contact; an investigator who is noticed only once can not be liable under the definition of "harassment." In any case, a competent detective will avoid being spotted at all. Even defendants concede that the utility of surveillance is limited once it is compromised. Furthermore, the statute requires "unconsented contact;" if there is no "contact" between the detective and the subject, there can be no claim for "stalking."

Defendants' public policy argument is overstated and unconvincing. Private investigators, insurance companies, law firms and investigative reporters will not be prevented from carrying on with their occupations. A good investigator is not likely to be observed two or more times, as would be required before the subject could make a claim for stalking.

The lower courts appropriately held that there was an issue for the finder of fact. This Court should affirm.

COUNTERSTATEMENT OF FACTS

This is an action for violation of Michigan's "anti-stalking" law and related claims, arising out of defendants' investigation of plaintiff in connection with an automobile accident. The bulk of the material facts are not in dispute.

Plaintiff Ronald Nastal ("plaintiff")[1] was injured in an auto accident on October 13, 1997. Deposition of Ronald Nastal, p 77; App, p 21b[2].) He suffered a head injury and was hospitalized overnight. (Oakwood Hospital records; App, pp 31b-36b.)

Before the accident, plaintiff was employed as an air conditioning repair technician with Chrysler Corporation. (Nastal deposition, p 10; App, p 46.) After the accident, he was unable to return to work and retired on disability on October 1, 1999. (Nastal deposition, pp 8-9, 75; App, p 3b-4b, 20b.) He reported headaches, emotional changes and family problems and did poorly on a neuropsychological assessment. (Ann Arbor Rehabilitation Centers report, 6/11/98; App, pp 37b-45b.) His wife described him as "a stranger." (Deposition of Irene Nastal, p 21; App, p 52b.) He was "never the same person" after the accident. (Irene Nastal deposition, pp 6, 20, 27; App, pp 48b, 51b, 53b.)

On June 2, 1998, plaintiff filed a complaint in the Wayne Circuit Court (case number 98-817150 NI) against Longhorn Leasing and Thomas Lee Randall, Jr. (Complaint, ¶ 3; App, p 31a.) Randall was the driver of the vehicle that struck plaintiff's car and Longhorn Leasing was Randall's employer. Longhorn was represented by Citizen's Insurance Company. (Complaint, ¶ 2; App, p 30a.)

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[1]Mrs. Nastal's claim are primarily, although not entirely, derivative of her husband's. (Deposition of Irene Nastal, p 20; App, p 51b.)

[2] Defendants have included only fragments of the relevant depositions, such as plaintiff's, in their appendix. Plaintiff's appendix contains complete transcripts of the major witnesses' testimony, which plaintiff submits will "clarify the subject matter included." MCR 7.308.

Pursuant to MCR 2.403, the matter was submitted for mediation (now "case evaluation") on May 11, 1999. (Deposition of Penny Judd, p 16; App, p 61b.) The mediation recommendation was $450,000. (Judd deposition, p 16; App, p 61b.). Plaintiff accepted the recommendation. (Judd deposition, p 66; App, p 74b.) Citizens rejected it. (Judd deposition, p 26; App, p 64b.)

Citizens considered the recommendation "excessive and extremely high." (Judd deposition, pp 27, 71; App, pp 64b, 75b.) The claims adjuster, Penny Judd, promptly consulted with her supervisor "due to the amount" of the recommendation. (Judd deposition, p 16; App, p 61b.) Judd then arranged a meeting with her superiors at Citizens and Joseph O'Brien, the attorney handling the file. (Judd deposition, pp 17, 21-22; App, pp 62b, 63b.) The meeting took place in June of 1999. (Judd deposition, p 18; App, p 62b.)

At the meeting, it was decided that Judd would order an "activities check" of plaintiff, that is, send the claim out for investigation. (Judd deposition, pp 25, 28; App, p 64b.) Citizens did not suspect that plaintiff's claim was fraudulent and conceded that it "had merit." (Judd deposition, p 29; App, p 65b.) The purpose of the "activities check" was "to know what the individual's activities were and what he was doing." (Judd deposition, p 29; App, p 65b.) "[W]e needed to see what his capabilities were . . . to see what he is doing." (Judd deposition, pp 30-31; App, p 65b.) Although she described the need to investigate claimants as "not frequent," she also testified that she called on investigators "three to four times" a year. (Judd deposition, pp 29, 42; App, pp 65b, 68b.)

Judd then retained the services of Henderson & Associates Investigations, Inc. ("Information Service Request;" App, p 79a.) Judd had used Henderson regularly for at least the previous 10 years. (Judd deposition, p 43; App, p 68b.) She picked Henderson for the Nastal

file because its office was in Livonia and plaintiff lived in Westland. (Judd deposition, p 44; App, p 68b.)

Judd faxed a request to Henderson and left the rest of the operation entirely up to them. (Judd deposition, pp 45-46; App, pp 69b.) Henderson decided how much surveillance time would be needed. (Judd deposition, p 47; App, p 69b.) Henderson also decided whether to videotape plaintiff's "activities." (Judd deposition, pp 41, 77; App, pp 68b, 77b.) Henderson eventually billed Citizens $3233.66 for its services, which Citizens paid. (Judd deposition, p 67; App, p 74b.)

The assignment form indicated that plaintiff had suffered a "head" injury. (App, p 79a.) Gregory Henderson, the owner and head of Henderson Investigations, firmly eschewed any knowledge of plaintiff's condition when he undertook the assignment. "I avoid getting medical information because it's out of my expertise." (Henderson deposition, p 69; App, p 144b.)

The surveillance

Henderson carried out a total of four periods of surveillance on plaintiff. (Henderson Investigations report dated July 14, 1999; App, pp 80a-100a; Henderson Investigations report dated August 5, 1999; App, pp 14b-151b[3].) They knew, from Judd's request, that plaintiff had suffered a head injury. (Henderson report, p 2; App, p 81a.)

The first period of surveillance was on June 30, 1999. (Henderson report, p 3; App, p 82a.) A Henderson employee, Andrew Conley, picked up plaintiff when he left his home about 7:00 a.m. (Henderson report, p 4; App, p 83a.) Plaintiff was on his way to Ann Arbor Rehabilitation Centers, Inc., where he went twice a week for therapy. (Nastal deposition, p 13, App p 92a.) Plaintiff quickly noticed that he was being followed:

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[3] Defendant's appendix entry, although labeled "Henderson File on Nastal," does not include this report.

> I would go down Michigan [Avenue] and I would see this car in my mirror, it would never pass me. I'd get in the right lane where other cars would be in back of me, he would pull out and then go back in line. I pulled in . . . a Burger King [and] got a coffee. This person walks in, I nod my head, I hold the door open or whatever for him, he goes in. I get in my truck . . . . I looked in my mirror, I seen this person running out and getting back into the same car that was following me. . . . Everywhere I went that person was following me. [Ronald Nastal deposition, p 23; App, p 7b.]

The same person followed plaintiff as he drove to the clinic, despite his several wrong turns. (Nastal deposition, pp 26-27; App, p 8b.)[4] He finally drove past the clinic lot after plaintiff had parked his truck. (Nastal deposition, p 27; App, p 8b.) The driver was wearing dark glasses. (Nastal deposition, p 27; App, p 8b.)

Plaintiff reported the incident to his therapist, "Gina"[5]. (Nastal deposition, pp 27, 29; App, pp 8b-9b.) Plaintiff and Gina went out and approached the driver. (Nastal deposition, pp 29-30; App, p 9b.) "His car was facing me, facing my exit in another lot." (Nastal deposition, p 30; App, p 9b.) Plaintiff confronted him. (Nastal deposition, p 30; App, p 9b; Deposition of Andrew Conley, p 35; App, p 87b.) Conley denied following plaintiff. (Henderson report, p 5; App, p 84a.) Plaintiff, correctly, did not believe him. (Nastal deposition, p 31; App, p 9b.) Plaintiff became "belligerent." (Conley deposition, pp 35, 42; App, pp 87b, 89b.) "He was swearing at me." (Conley deposition, p 35; App, p 87b.) "He called me a 'dick fuck,' swore some more. . . . [H]e was yelling . . ." (Conley deposition, p 43; App, p 89b.)

Plaintiff took down the license plate number of the car and Conley drove off. (Nastal deposition, p 32; App, p 9b.) Conley parked his car in a parking lot nearby, somewhere between 100 and 300 yards away. (Conley deposition, pp 35, 44; App, pp 87b, 90b.) He communicated

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[4] Conley interpreted these as "maneuvers to detect and evade surveillance." (Henderson report, p 5; App, p 84a.)

[5] Gina E. Trusedell-Todd, a social worker and psychologist. (Report of Leon Quinn, M.D., p 2; App p 129a.)

with Gregory Henderson by radio "two or three minutes" after the confrontation. (Conley deposition, pp 41-42; App, p 89b.) Conley noted, "Surveillance is terminated, due to being compromised" at 8:10 a.m. (Henderson report, p 5; App, p 84a.)

"Gina" called the Ann Arbor police. (Nastal deposition, p 34; App, p 10b.)[6] Plaintiff pointed out the vehicle. (Nastal deposition, pp 35-36; App, p 10b.) Plaintiff went over to it and saw that the driver "had a note pad and he's writing." (Nastal deposition, p 36; App, p 10b.) The officer spoke to Conley. (Conley deposition, pp 36-37, 39; App, pp 88b.) Conley may have produced identification for the officer, because "I usually have the ID in the car ready for them, so I can explain what I'm doing." (Conley deposition, p 47; App, p 90b.) He "told them I was a private investigator investigating an insurance claim" and "told her who I was investigating" (Conley deposition, pp 37, 48; App, pp 88b, 90b.) Although the officer noted the call in an activity log, she did not make a report. (Patrol Activity Log; App, p 104b.) After she spoke to Conley, she told plaintiff that "this has nothing to do with you." (Nastal deposition, p 36; App, p 10b.)

The second surveillance, on July 6, 1999, was less dramatic, but still eventful. (Henderson report, pp 7-12; App, p 86a-91a.) Conley and another investigator, Andrew Stovall, followed plaintiff as he drove to Detroit, returned, and went for a walk near his home. (Henderson report, pp 8-10; App, pp 87a-89a; Conley deposition, p 73; App, p 97b.) Plaintiff did not confront the investigator, but was aware of him.

Q: So you picked up your father, and was the Jeep following you the whole time?

A: Yes.

Q: Did you notice him following you the whole time?

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[6] Defendants assert that it was plaintiff was called the police. (Defendants' brief, p 3; p 13; n 9.)

A: I noticed them back there . . . after I picked my father up. . . I made my left turn and I stopped, I seen the Jeep stop, seen where I was and he went straight. . . .

Q: So you took evasive action it sounds like?

A: I just backed up. It's easier. . . .

Q: And the Jeep never made any gestures towards you or any effort to demonstrate that they were in fact following you?

A: On the expressway, yes, they did.

Q: What did they do?

A: I was on the expressway, the white car was on the side of me and then the white car got in front of me. The Jeep was on the side of me but a little bit in the back. There was another car – I was in the right lane. I was in the right lane and the white car was in the right lane, the Jeep was in back of me in the center lane and there was another car in my lane, the right lane. I turned off, the Jeep tried to turn off, he almost run this guy off the road. Then they had to go to Connors, which they picked me up on Connors. . . . I go down Connors and they are right there. They picked me up, I slowed down, the Jeep passes me up . . . [Nastal deposition, pp 55-57; App, p 15b-16b.]

Plaintiff also observed the vehicles watching for him when he came out of his appointment with a doctor at the Chrysler plant. (Nastal deposition, p 58; App, p 16b.) The Henderson report did not indicate that plaintiff was aware of being under surveillance. Plaintiff, however, had seen the cars following him and observed them in front of the house. He called his wife at work, in a state of extreme agitation, and she came home:

> [H]e beeped [paged] me and I called him and he was half crying. He says, "You've got to come home. You've got to come home." And I say, "Why, what is wrong." He said, "Someone is following me." I said, "Come on, Ronnie, there is nobody following you." And he said, "Yes, there is." And I said, "Honey, there is not. You just think." [He said] "No, they're following me, they're following me."
>
> Well, I had to leave work because he just was uncontrollable and I was not going to leave him home by himself. So I came home and all of the doors were closed, the windows were closed, the drapes were closed. Everything was like a morgue in the house. And I said, "What is this?" He says there is two cars out there and they are following me. And I said, "Where?' He said, "They are out there." And I said, "Who is out there?" He says there is two cars out there and they are following me. And I said, "Where?" So we went out onto the front porch and I

looked, and to my right there is a street called St. Joe. He pointed to a car over there. . . . [Irene Nastal deposition, p 10; App, p 49b.]

Mrs. Nastal decided to check out the situation, so she set up a false trail:

I went in, I got on his coat and I put his hat on. I could see people sitting in these vehicles. I put his coat and his hat on and I got in the van. And from where they were parked at to where my van was parked you couldn't see who was getting in or out of that van. I got in the van and I pulled out of the drive and started down the street. [Irene Nastal deposition, p 11; App, p 49b.]

Conley and Stovall promptly followed her:

[S]ure enough they started following me till they pulled up alongside of me and they saw that it wasn't him. . . . [They followed her] Until I go on Newburgh and Palmer. And the one vehicle, the older vehicle[7] looked over and saw that it was me. And the next street he turned at . . . [Irene Nastal deposition, p 11; App, p 49b.]

After identifying Mrs. Nastal as the driver, the observer (probably Conley) returned to plaintiff's home. "[B]y the time I got back home both vehicles were parked in the same spot they were in when I left." (Irene Nastal deposition, pp 11-12; App, p 49b.)

Plaintiff called the Westland Police just before 11:00 a.m. to report that someone was following him in a white Grand Prix in the area of Avondale and Sutton. (Westland police radio logs; App, p 105-108b.) Stovall, the other Henderson investigator, was, in fact, parked about "7 or 8 houses" south of plaintiff's home. (Stovall deposition, p 41; App, p 119b.) He had a vague recollection that two Westland police cars approached him. (Stovall deposition, pp 32, 34; App, p 117b.) He "got the impression" that they had been called, that "someone was aware of" the investigators' presence, although he did not know that it was plaintiff who had made the report. (Stovall deposition, pp 33, 35, 45; App, pp 117b, 120b.) Stovall did not ask who had called the police, but he admitted that it "very well could be" plaintiff who had made the complaint. (Stovall deposition, pp 45-46; App, p 120b.)

[7] Presumably Conley's 1978 Monte Carlo. (Conley deposition, p 81; App, 99b.)

Stovall spoke to the officers[8], but did not recall what he told them. (Stovall deposition, pp 33, 34-36; App, pp 117b-118b.) He said that he did not "keep anything" from the police but did not remember "what my conversation was with them as far as what we were doing out there." (Stovall deposition, p 36; App, p 118b.)

Stovall did not tell Henderson the police had been called. (Stovall deposition, p 42; App, p 119b.) He testified that he would only inform his boss about a police encounter if the subject of the surveillance were the complainant:

> If we had direct conversation from the police officer that they guy you are watching called us and said something, I would probably let Mr. Henderson know in a situation like that. If it's just a neighbor calling about a suspicious vehicle . . .
>
> [I]f the police officer said the person you are watching, and had that person by name, because we could have just got back into the area and followed a car in there and then parked by their house, so I don't know who he is speaking of, unless if he specifically states that it's the person that you are watching. I have no idea who he is talking about when he says someone – someone says you're following them. [Stovall deposition, p 42-44; App, p 119b.]

After apparently speaking to Stovall, a police officer came back and said to plaintiff, "he's investigating you for insurance fraud, if you didn't do nothing you ain't got nothing to worry about . . ." (Nastal deposition, pp 67, 70; App, pp 18b, 19b.) Mrs. Nastal tried to follow up as well but could not get anything either.

> They just told us that they couldn't give us any information. Because we did ask them who they were, where they were from, and they said that we cannot give that information out. [Irene Nastal deposition, p 28; App, p 53b.]

Conley and Stovall did not include any report of this incident. (Deposition of Gregory Henderson deposition, pp 40-41; App, pp 119b.) Henderson tried another day of surveillance on

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[8] Conley did not recall seeing or speaking to any police officers on that day. (Conley deposition, pp 74-79; App, pp 97b-98b.)

July 8, 1999. (Henderson report, pp 13-15; App, pp 92a-94a.) Plaintiff did not leave his house and apparently did not observe the investigators.

Judd requested a final day of surveillance later in July, "on a Saturday." (Judd deposition, pp 54, 74; App, p 71b, 76b.)[9] Gregory Henderson testified that a two- or three-week "cooling off" period between surveillance episodes is "standard operating procedure." (Henderson deposition, p 32; App, p 130b.) "[I]f we were compromised or confronted, it gives them a few weeks to look over their shoulders and see nothing." (Henderson deposition, p 33; App, p 131b.) Henderson chose Saturday, July 31, 1999. (Henderson & Associates report dated August 5, 1999; App, pp 146b-151b.)

This time, plaintiff left the house at in mid-morning and drove to Wonderland Mall in Livonia. (Henderson report of 8/5/99, p 5; App, p 149b.) Again, plaintiff saw the vehicles following him and responded.

> I went into Montgomery Ward's.[10] I noticed that they were there, the Jeep, the white car. . . . They followed me to Ward's. . . . I seen one man . . . come into Ward's and just keep looking. . . . [H]e spotted me[,] he focused on me till I left. [Nastal deposition, p 60; App, p 16b.]

In the parking lot, plaintiff saw "the white car" again. (Nastal deposition, p 61; App, p 17b.) Plaintiff got into his truck and "pulled up on the side of him," where he stopped to take down the vehicle's license plate number. (Nastal deposition, p 61; App, p 17b.) Immediately:

> I turned around, here comes the Jeep coming at me. I turned around, I'm chasing the Jeep in Montgomery Ward's lot. In back of me is this white car coming after me. I turn around to go out, the white car stops in front of me. I missed him by this much. [Nastal deposition, p 61; App, p 17b.]

Henderson's employees described the incident succinctly:

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[9] Judd did not explain the significant of "a Saturday."

[10] Plaintiff mistakenly referred to the Ward's at "Livonia Mall." (Nastal deposition, p 59; App, p 16b.) Livonia Mall is two miles north of Wonderland Mall.

> C-2 [claimant, i.e., plaintiff] performs maneuvers in an attempt to get behind Investigator Nathaniel Stovall's vehicle in an open area of the parking lot. C-2 turns in tight circles and maneuvers quickly. [Henderson report 8/5/99, p 5; App, p 149b.]

Conley also thought plaintiff was writing down his license plate number. (Conley deposition, p 63; App, p 94b.) Conley radioed Henderson "[b]ecause he [plaintiff] appeared to be suspicious of the surveillance, " "[t]here's a possibility that he may be on to us." (Conley deposition, pp 61-62, 63-64, 65; App, pp 94b-95b.) Henderson told them to continue the surveillance. "[S]ee if you can get him somewhere and then terminate it." (Conley deposition, p 65; App, p 95b.)

Plaintiff left the mall parking lot to go home. (Nastal deposition, p 62; App, p 17b.) The two vehicles continued to follow him, going through yellow lights and making an illegal turn on a red light. (Nastal deposition, p 62; App, p 17b.) Plaintiff drove to a park, where he used to walk regularly. (Nastal deposition, p 63; App, p 96b.) He pulled into a turn-off, with parking spaces, and the white car followed him. (Nastal deposition, p 63; App, p 149b.) "[H]e stayed right with me." (Nastal deposition, p 63; App, p 96b.)

Conley described "maneuvers to detect, evade and elude surveillance in the area of Ford Road and Central City Parkway . . ." at 12:27 p.m. (Henderson report 8/5/99, p 5; App, p 150b.) By that point, Conley and Stovall were aware that "more than likely" plaintiff knew he was being followed and it was "clear" that he was trying to get away from them. (Conley deposition, pp 68, 69; App, pp 96b.) Nonetheless, they continued to follow him to Ford Road and Newburgh Road. (Conley deposition, p 68; App, p 96b.)

> I think I went to Newburgh [Road], they had road construction. The right lane had barriers . . . The left lane was open. I got stuck in the right lane . . . I had to stop, the Jeep right in back of me. I waited till traffic cleared, maybe twice to see if he would leave me go, leave me alone. He stayed there until I left, right in back of me. Then he followed me. [Nastal deposition, p 64; App, p 17b.]

The surveillance was terminated at 12:41 p.m. (Henderson report 8/5/99, p 6; App, p 150b.) Gregory Henderson made the decision to end the surveillance for the day, because Henderson "always" made those determinations. (Stovall deposition, pp 54, 55-56; App, p 122b-123b.) Neither Conley or Stovall ever told plaintiff who they were or why they were following him. (Conley deposition, p 70; App, p 96b.)

Plaintiff went to the Westland Police Department to report what had happened. (Nastal deposition, p 64; App, p 17b.) The police were not interested, however, and plaintiff simply stopped walking in the park as a result of the incident. (Nastal deposition, p 65; App, p 18b.) He gave the license plate number to a Westland police officer, but was not given any information in return. (Nastal deposition, p 54; App, p 15b.)

> My husband explained to them that he was being followed and the police officer asked him, "What do you mean by that?" And he explained to him, you know, that he had gone here and there and that the same vehicle had been following him. And the police officer asked him, you know, did they stop you or anything like that, and he said no. And the police officer told him that there was nothing that they could do about it. [Irene Nastal deposition, pp 15-16; App, p 50b.]

Gregory Henderson called Judd on August 4, 1999 and she instructed him to discontinue the surveillance. (Judd deposition, pp 60-61; App, pp 72b-73b.) "[W]e're not truly seeing what his activities are and that was the purpose of the investigation was to determine what his activities were." (Judd deposition, p 62; App, p 73b.)

The consequences

By this time, however, plaintiff had been rendered virtually incapacitated by the knowledge that he was being followed. Before the surveillance, he had gone out walking every day, usually twice a day, both at a park and near his home. (Irene Nastal deposition, p 7; App, p 48b.) After the surveillance incidents, he stopped. "[H]e became alarmed and afraid and he just

quit." (Irene Nasal deposition, p 7; App, p 48b.) "[H]e just totally refuses" to go out. (Irene Nastal deposition, p 8; App, p 48b.) Both plaintiff and Mrs. Nastal saw vehicles parked in the street early in the morning and later in the day, which they believed were following plaintiff. (Irene Nastal deposition, pp 13-14; App, p 50b.) Mrs. Nastal also said that "I had neighbors telling me" that people were following her husband. (Irene Nastal deposition, p 17; App, p 51b.)

Plaintiff continues to believe he is being followed. (Nastal deposition, p 20; App, p 6b.) He "still feels that they are [following him], and I can't convince him of or prove to him that they are not because he just feels they are." (Irene Nastal deposition, p 22; App, p 52b.) Plaintiff was so unnerved by the surveillance that he began "shaking" during one of his therapy sessions, when he described it. (Irene Nastal deposition, p 16; App, p 50b.)

Plaintiff now does not leave home alone, except to go to therapy appointments and sometimes to a bowling league. (Irene Nastal deposition, p 18; App, p 51b.) He is reluctant to go out at all:

> If I wanted to go somewhere, go out, go out and do something, he wouldn't do it. He was too afraid there were people out there watching him. He didn't want to go anywhere, he didn't want to do nothing, he just wanted to stay locked up in the house. [Irene Nastal deposition, p 21; App, p 52b.]

For a time, he also "would keep all of the curtains and doors and everything locked up." (Irene Nastal deposition, p 19; App, p 51b.) Even after he started opening the curtains again, "every once in a while he keeps telling me I know they are still out there." (Irene Nastal deposition, p 19; App, p 51b.) "He just still has this fear in him." (Irene Nastal deposition, p 19; App, p 51b.)

There is additional support for finding that the surveillance had a negative effect on plaintiff. As part of its long-running efforts to minimize plaintiff's damages after the accident, Citizens sent plaintiff to an assortment of physicians for evaluations. One of these was Dr. Leon

J. Quinn, a psychiatrist. (Judd deposition, p 31; App, p 65b; Quinn report, App, pp 128a-140a.) Quinn examined plaintiff at noon on July 6, 1999, that is, one of the days he was being followed by Conley and Stovall.[11] Quinn noted:

> Mr. Nastal initially complained about people following him and was quite irate about that. Apparently, he noticed this phenomenon only recently and had reported it to the police. During the latter part of the interview, his wife seemed to confirm the fact that there were vehicles following him and they apparently called the police who pursued one of the individuals and later reported back to the family that the person was a "private investigator" and was free to do whatever he wanted to do. Mr. Nastal apparently also reported this to his therapist, Gina, in Ann Arbor, who obtained the license number of the vehicle pursuing him. Mr. Nastal could give no reason why anybody should follow him but he seemed quite irate about it. [Quinn report, p 11; App, p 138a.]

Quinn concluded,

> I would also suggest surveillance of Mr. Nastal, if it is being authorized, be discontinued, since it has the potential to provoke additional symptomatology. [Quinn report, p 12; App, p 129a.]

Quinn was deposed later. He testified:

> And it seemed particularly upsetting to him so my suggestion probably should have been *if this was being done, someone who was really good at it should be hired or it should be discontinued.* It didn't seem to be beneficial if you're looking at it from Mr. Nastal's standpoint. It was causing more harm than good but I don't suppose the purpose of it was to cause good.
>
> * * *
>
> It just seemed from a clinical stand point not a good idea. . . . It made him angry. He had enough reasons to be angry. . . It's not good to get angry over these things. . . . It could exacerbate some symptoms. It mainly caused him to focus on that and he had another thing to get upset and bothered and distressed over . . . [Quinn deposition, pp 101-102; App, p 153b-154b. Emphasis supplied.]

Quinn's report was addressed to Joseph O'Brien, Citizens' attorney. (Quinn report, p 1; App, p 128a.) Although the report was dated July 8, 1999, O'Brien's office allegedly did not receive it until July 22. (Judd deposition, p 54; App, p 71b.) O'Brien allegedly did not forward it to Penny Judd until a week later; she stated that she did not receive it until July 30, 1999.

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[11] The incident with the Westland police occurred at 11:00 a.m. that day.

(Judd deposition, p 54; App, p 71b.) Because July 30 was a Friday, she did not read it until the next week. (Judd deposition, p 55; App, p 71b.)

Judd and Gregory Henderson discussed the results of the first three days of surveillance on July 9, 1999. (Judd deposition, p 56; App, p 71b.) On or about July 13, 1999, Judd called plaintiff's counsel and offered $50,000 to settle the case. (Judd deposition, p 64; App, p 73b.) He refused the offer. (Judd deposition, pp 66-67; App, pp 74b.) Judd then obtained authority to offer $150,000. (Judd deposition, pp 69-70, 72-73; App, pp 74b-75b, 75b-76b.) The case was settled later in 1999. (Judd deposition, p 33; App, p 66b.) Although the amount of the settlement is not part of the record in the present matter, it is considerably less than the mediation recommendation.

On September 19, 2000, plaintiff filed a complaint in the present case. The named defendants were Citizens, Henderson & Associates and two "John Doe" defendants; the case caption was later amended to name Gregory Henderson, Andrew Conley and Nathanial Stovall. (Stipulated order dated September 19, 2001 [circuit court docket entry # 70]; App p 3a.)

As to Henderson, the complaint alleged

> 10. That the Defendant Henderson, through their agents, servants and/or employees, in their "investigation" of Plaintiff, did follow Plaintiff, making their presence known during said "investigation", and did otherwise frighten, harass, threaten intimidate and/or stalk the Plaintiff.
>
> 11. That the Defendants, through their employees, agents and/or servants, did intentionally cause their presence to be known to the Plaintiff during their "investigation" and following of him for the sole purpose of intimidating him and making him fearful so that he would settle his case for less than he was entitled to.
>
> 12. That the conduct of Defendants was done knowing that the Plaintiff had sustained a traumatic brain injury.
>
> * * *
>
> 20. That the Defendants' willful course of conduct involving repeated and/or continued harassment of Plaintiff, Ronald Nastal, did cause the Plaintiff to feel terrorized, frightened, intimidated, threatened and harassed.

> 21. That the Defendants' conduct was in violation of Michigan's stalking laws, specifically MCL 750.411 and MCL 600.2954.
>
> 22. That the Defendants have intentionally inflicted emotional distress upon the Plaintiff, Ronald Nastal, in that their conduct was done extremely reckless and outrageous and did cause Plaintiff emotional distress. [Complaint; App, pp 30a-32a.]

Both Citizens and Henderson eventually moved for summary disposition. Both motions were heard by the Hon. Cynthia Diane Stephens of the Wayne Circuit Court on October 19, 2001. (Tr I; App, pp 36a-72a.)

Plaintiff agreed that his claim for defamation was barred by MCL 600.5805(8) ("[t]he period of limitations is 1 year for an action charging libel or slander"). (Tr I, p 11; App, p 46a.) The trial court dismissed that claim. (Tr I, p 20; App, p 57a.) The court also dismissed plaintiff's allegations of intentional infliction of emotional distress. (Tr I, p 22-23; App, pp 57a-58a.) These claims were not at issue in the Court of Appeals. The court found, however, that Citizens could be responsible for plaintiff's injuries on the basis of agency. (Tr I, p 24; App, p 59a.)

The court then held that Henderson might be liable for negligence in carrying out the surveillance.

> However, the specific suggestion as to how a specific surveillance were [*sic*] to be undertaken is an indicia of control, and that indicia is sufficient to allow the question of agency and – as well as the question of whether or not the agent's actions were negligent to be presented to the rational trier of fact for their rational conclusion.
>
> Motion is denied as relates to the negligence claim, only. [Tr I, p 25; App, p 60a.]

The court also denied Henderson's motion as it related to plaintiff's claims under MCL 600.2954, the "stalking" statute.

> MCL 600.2954, indicates a victim may maintain a civil action against an individual who engages in conduct prohibited, for damages incurred by the victim as a result of that conduct.

> My understanding is that that same statute does not say that the individual, the only civil action that that individual can bring is one for intentional infliction of emotional distress. It says that they may bring a civil action.
>
> So if, in fact, there is a finding by this Court that the plaintiff can meet their burden of going forward on the elements, on the elements of the stalking statute, then whatever damages arise therefrom could be presented to the trier of fact, whether sounding in intentional infliction of emotional distress or negligence. [Tr I, p 35; App, p 70a.]

Subsequent to the motion hearing, Citizens settled with plaintiffs and was dismissed from the action. (Docket entry #146; App, p 6a.) After a prolonged dispute over the wording, the trial court entered an order on April 23, 2002, providing simply that "Defendant Henderson & Associate's [*sic*] Investigations, Inc.'s, Motion for Summary Disposition is granted in part and denied in part for the reasons stated on the record." (Order; App, p 14a.)

Henderson then applied for leave to appeal to the Court of Appeals. The panel (Judges Wilder and Murray) granted the application in an order dated June 17, 2002, "Limited to the issues raised in the application." Judge Kelly would have denied leave to appeal.

The Court of Appeals issued its opinion on October 23, 2003. (Opinion; App, pp 15a-21a.) A revised opinion, correcting a typographical error in a citation, was issued on October 30, 2003. (App, pp 22a-28a.) The court (Judges Cavanagh, White and Talbot) affirmed in part and reversed in part. The panel held that plaintiff had stated a claim under the "stalking" statute. (Opinion, pp 4-6; App, pp 18a-20a.) The panel did, however, agree that plaintiff could not state a claim for common law negligence, because Henderson did not owe a duty to him. (Opinion, p 6 App, p 20a.)

This Court granted defendants' application for leave to appeal in an order dated June 3, 2004.

ARGUMENT I

THE COURT OF APPEALS DID NOT ERR IN HOLDING THAT PLAINTIFF HAD STATED A CLAIM FOR "STALKING" AS IT IS DEFINED IN MCL 750.411h.

Standard of Review

Henderson's motion for summary disposition in the trial court was identified as brought "pursuant to MCR 2.116(C)(7), (8) and (10)." In the Court of Appeals, defendants described only the (C)(10) standard. In this Court, defendants cast the issue as one of statutory interpretation, subject to de novo review. (Defendants' brief, p 10.)

Plaintiff submits that this case does not involve a question of "statutory interpretation." Neither the trial court nor the Court of Appeals was being asked to construe the terms "stalking" or "harassment," or any other word used in MCL 750.411h. Rather, the issue was whether a reasonable finder of fact could view the facts as developed in the trial court and decide that they described conduct that constituted "stalking," as it is defined in MCL 750.411h(1)(d). The Court of Appeals, then, correctly reviewed the trial court under the MCR 2.116(C)(10) standard. (Opinion, p 4; App, p 25a.)

Issues concerning the proper interpretation of statutes are questions of law that are reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Similarly, this Court applies a de novo standard when reviewing motions for summary disposition made under MCR 2.116(C)(10), which tests the factual support for a claim. *Id.* The facts are considered in the light most favorable to the nonmoving party. *Id.*

(a)

The "intent" of the Legislature is irrelevant where the language of the statute is not ambiguous.

i. Where the language of a statute is clear, the court may not engage in interpretation of it.

This Court has repeatedly adhered to the doctrine of separation of powers[12] by holding that the courts must not engage in interpretation when the meaning of a statute can be determined from its face. "The focus of statutory interpretation must be on the language used by the Legislature." *Twichel v MIC General Ins Corp*, 469 Mich 524, 531-532; 676 NW2d 616 (2004) (definition of "owner" of motor vehicle). "The courts are not free to manipulate interpretations of statutes to accommodate their own views of the overall purpose of legislation." *Id.* "If the Legislature's intent is clearly expressed, no further construction is permitted." *Morales v Auto-Owners Ins Co*, 469 Mich 487, 490; 672 NW2d 849 (2003). "Under such circumstances, a court is prohibited from imposing a 'contrary judicial gloss' on the statute." *Id.*

Plaintiff submits that the Legislature's "intent" need not be inferred, because the language of MCL 740.411h is not ambiguous or unclear.

ii. This Court will not consider legislative history when the statutory language can be applied as written.

It is a well-established principle that this Court "do[es] not resort to legislative history to cloud a statutory text that is clear." *In re Certified Question from US Court of Appeals for Sixth Circuit*, 468 Mich 109, 116; 659 NW2d 597 (2003) (quotations omitted). It is interesting to note that, in *In re Certified Question*, this Court expressly disapproved of the sort of "legislative analysis" proffered by defendants here as a source of "legislative history," even when the court finds a need to resort to such input:

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[12] Const 1963, art 3, § 2.

> In no way can a "legislative analysis" be said to officially summarize the intentions of those who have been designated by the Constitution to be participants in this legislative process, the members of the House and the Senate and the Governor. For that reason, *legislative analyses should be accorded very little significance by courts when construing a statute.* [468 Mich 115, n 5. Emphasis supplied.]

Plaintiff maintains that no construction of the statute at issue here is required. If, however, this Court finds that MCL 750.411h is ambiguous, the "legislative analyses" offered by defendants are of minimal value in interpreting the statute.

iii. The Legislature had the opportunity to include an express exemption for actions by private investigators but did not.

Another well-settled principle of statutory construction is that the court will consider the fact that the Legislature could have included words in a statute but did not do so. See, e.g., *People v Phillips*, 469 Mich 390, 396, n 5; 666 NW2d 657 (2003) ("[h]ad the Legislature intended that the right to a polygraph examination be limited to a pretrial procedure, it could have clearly so stated"); *People v Davis*, 468 Mich 77, 81; 658 NW2d 800 (2003) ("[o]ur Legislature could have made it a crime to deprive a person of transportation, but it did not").

Defendants refer to statutes from five other states that have included an exemption for private detectives in their "stalking" statutes. This picture, however, is incomplete.

A total of 54 jurisdictions (including states, territories, the United States and the District of Columbia) have statutes prohibiting stalking or providing some form of regulation of conduct by that name.[13] Of those 54, eleven (the United States, Arkansas, Colorado, Connecticut, Florida, Hawaii, Iowa, Louisiana, Massachusetts, Ohio and Puerto Rico) make no provisions

[13] This review does not attempt to distinguish among jurisdictions that create a crime of "stalking;" those that only provide for injunctive relief; and those that recognize a civil damage claim arising out of the same actions.

within the applicable statutes for actions that, while otherwise fitting the statutory definition, are not "stalking."[14]

A sprinkling of jurisdictions make some reference to specific actions or occupations that will not be included in whatever conduct is defined as "stalking." Not surprisingly, several states except law enforcement officers or their equivalent. See Ark Code Ann 5-71-229(c); Del Code Ann 1312A(d); ND Cent Code 12.1-17-07.1(4); NM Stat Ann 30-3A-4(B); Or Rev Stat 163.755(1)(c)(A); SC Code Ann 16-3-1700(A); Utah Code Ann 77-3a-101(1); Va Code Ann 18.2-60.3(A).

Only a relatively few jurisdictions, however, include *private* actors in the group of persons entitled to specific release from their stalking laws. See Ark Code Ann 5-71-229(c)("licensed private investigator, attorney, process server, licensed bail bondsman, or . . . store detective . . ."); Del Code Ann 1312A(d) ("private investigators, security officers or private detectives"); Ga Code Ann 16-5-92 ("persons or employees of such persons lawfully engaged in bona fide business activity or lawfully engaged in the practice of a profession"); Md Code Ann Crim Law 3-802(b)(2) ("conduct that is performed to carry out a specific lawful commercial purpose"); Minn Stat 609.749. subd 7 ("under terms of a valid license . . . or to carry out a specific lawful commercial purpose or employment duty"); Nev Rev Stat 200.575(e)(3) ("activities of a person that are carried out in the normal course of his lawful employment"); SC Code Ann 16-3-1700(A) (process servers); ND Cent Code 12.1-17-07.1(4) (private investigator); Tenn Code Ann 39-17-315(c) ("following during the course of a lawful business activity"); Utah Code Ann 77-3a-101(1) ("licensed private investigators, acting in their official capacity"); Va

[14] Additional discussion of other jurisdictions' statutes appears *infra* at Argument II.

Code Ann 18.2-60.3(A) (registered private investigators); Wash Rev Code Ann 9A.46.110(3) ("licensed private investigator[s]").

Michigan's stalking law was enacted in 1992 (1992 PA 260; 1992 PA 261), approximately the same time as the other states' statutes. The Legislature may be presumed to have been aware of the possibility of including a specific exemption for "private investigators," "private detectives," persons "engaged in the practice of a profession," conduct "performed to carry out a specific lawful commercial purpose," etc. It did not do so. This omission is a clue that the Legislature did not propose to create a blanket exemption of the sort that defendants now seek from this Court.

(b)

Plaintiff presented a prima facie case that defendants were liable for "stalking" under the statute.

MCL 600.2954 provides:

> (1) A victim may maintain a civil action against an individual who engages in conduct that is prohibited under [MCL 750.411h and MCL 750.411i], for damages incurred by the victim as a result of that conduct. A victim may also seek and be awarded exemplary damages, costs of the action, and reasonable attorney fees in an action brought under this section.
>
> (2) A civil action may be maintained under subsection (1) whether or not the individual who is alleged to have engaged in conduct prohibited under [MCL 750.411h and MCL 750.411i] has been charged or convicted . . . for the alleged violation.
>
> (3) As used in this section, "victim" means that term as defined in section [MCL 750.411h].

The Michigan statute has been described as "the toughest in the nation." Wickens, *Michigan's new anti-stalking laws: Good intentions gone awry*, 1994 Det C L Rev 157, 158, 164 n 43 (1994) ("DCL Comment"), citing *Engler Signs Bill to Stop Stalkers*, Detroit Free Press, Dec 12, 1992, at 3B.

The relevant portion[15] of the Michigan "stalking" statute,[16] MCL 750.411h(2), provides that "[a]n individual who engages in stalking is guilty of a crime . . ." MCL 750.411h(1)(d) defines the offense:

> "Stalking" means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

The validity of the stalking law is well-settled. See *People v White*, 212 Mich App 298; 536 NW2d 876 (1995); *Brandt v Brandt*, 250 Mich App 68, 72; 645 NW2d 327 (2002); *Staley v Jones*, 239 F3d 769 (CA6 2001); *People v Coones*, 216 Mich App 721, 728; 550 NW2d 600 (1996); *People v Ballantyne*, 212 Mich App 628; 538 NW2d 106 (1995). See also, generally, Anno: *Validity, construction, and application of stalking statutes*, 29 ALR5th 487.

The Michigan statute, as originally proposed in the House, included a specific intent element. DCL Comment, p 166.[17] That language was deleted, then reintroduced in successive versions of the legislation. Drafters were concerned "that stalkers, who allegedly lacked the intent to injure or terrorize their victims, would allegedly escape punishment under a statute requiring a specific intent to harass." DCL Comment, p 174. "Michigan legislators . . . determined that in order to be effective, anti-stalking statutes needed to be drafted from the victim's perspective rather than the defendant's." DCL Comment, p 174. "The final statutes, in order to provide the greatest protection to stalking victims, were general intent crimes that punish

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[15] The remainder of the statute deals with penalties.

[16] MCL 750.411i defines "aggravated stalking."

[17] According to another survey of stalking laws, "most state statutes . . . [have] two main components: a threat requirement and an intent requirement." Tolhurst, *A search for solutions: evaluating the latest anti-stalking developments and the national institute of justice model stalking code*, 1 Wm & Mary J of Women & L 269, 275 (1994). See, generally, Lamplugh & Infield, *Harmonising anti-stalking laws*, 34 Geo Wash Int'l L Rev 853, 861-865 (2003).

unconsented contact and presume that a victim was actually alarmed by a defendant's conduct." DCL Comment, p 174.

In the present case, plaintiff established the elements of "stalking" as defined in MCL 750.411h(1)(d).

i. Defendants' conduct was "willful."

There is no dispute that defendants deliberately followed plaintiff with the intention of observing and recording his activities. Thus, the "willful" element is established.

ii. Defendants engaged in a "course of conduct."

"Course of conduct" is defined as "a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose." MCL 750.411h(1)(a). The Court of Appeals considered the "course of conduct" element in *Pobursky v Gee*, 249 Mich App 44; NW2d (2002). The plaintiff obtained a personal protection order (PPO) against the defendant, based on "stalking as defined in MCL 750.411h." *Id.* at 45. The respondent "allegedly attacked petitioner, hurled him over a bench into a wall or plate glass window, and then choked him while repeatedly threatening him." *Id.* The Court of Appeals determined that the PPO should have been set aside, because it was not based on "repeated or continuing harassment . . ." That is, "two or more separate noncontinuous acts are acts distinct from one another that are not connected in time and space" are required. 249 Mich App 44.

Defendants followed plaintiff on four occasions, three of which he knew about, in four different locations. Defendants' actions clearly involved "two or more separate acts," which were "noncontinuous" in either time or space.

iii. Defendants' conduct was "repeated or continued."

As noted, defendants followed plaintiff on four different days. Despite having being "compromised" on the first try, they went back again on July 6. They were spotted again and

returned on July 8. And on July 31, they pursued plaintiff even after the episode in the parking lot at Wonderland Mall. Defendants' actions, then, can be characterized as "repeated," "continuous," or both.

iv. Defendants' conduct constituted "harassment."

MCL 750.411h(1)(c) defines "harassment" as:

> [C]onduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose. [Emphasis supplied.]

Defendants' conduct fits the definition of "harassment" under the statute.

a. Unconsented contact.

MCL 750.411h(1)(e) provides:

> "Unconsented contact" means any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued. Unconsented contact includes. . . (i) Following or appearing within the sight of that individual.

Both Conley and Stovall "followed or appeared within sight" of plaintiff. The "contact" was initiated without plaintiff's consent. And plaintiff's actions on June 30, if not on July 6 and 31 as well, should certainly have made it plain to defendants that plaintiff "desire[d] that the contact be avoided or discontinued."

On this point, the Court of Appeals held:

> After the first surveillance was thwarted when plaintiff made it clear that he did not consent to being followed by Conley, Conley nonetheless continued to appear within plaintiff's sight until the police arrived. Once plaintiff detected Conley and Stovall in the second and fourth surveillances, a question of fact arose with respect to whether their continued appearance in his sight were unconsented contacts for purposes of the civil stalking claim. [Opinion, p 4.]

b. Repeated or continuing.

Defendants followed plaintiff four times. Defendants also continued to follow plaintiff after the confrontation in the parking lot on July 31. Either the "repeated" or "continuing" prongs, then, is satisfied.

c. Another individual.

There is no dispute that plaintiff is an "individual."

d. Causing a reasonable person to feel frightened, threatened or harassed.

Issues of "reasonableness" are traditionally left to the jury. "Where reasonable persons could reach different conclusions regarding whether these elements are established, the issue becomes a question of fact for the jury and not one properly decided by the trial court." *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 488; 516 NW2d 102 (1994).

Defendants' argument on this point telescopes two different issues: whether it was "reasonable" for plaintiff to anticipate being observed and whether the investigators' conduct in the present case would "cause a reasonable person" to feel intimidated. They are, however, two distinct questions.

As respects the issue of whether "observation," as such, was reasonable, plaintiff had no idea that the June 30, 1999 episode was connected to his lawsuit. He was injured in 1997 and filed suit in 1998. He might anticipate being "observed," but he cannot be expected to have known, over a year later, that the underlying defendant's insurance company had suddenly decided to request surveillance of him.

Even if it is accepted that plaintiff should not have been disturbed by the mere fact of being followed, the question remains whether defendants' actions in actually carrying out that surveillance were such as to "cause a reasonable individual to suffer emotional distress." MCL 750.411h(1)(c). It is not dispositive that "at no point did Conley or Stovall ever act aggressively

or in a threatening manner" toward plaintiff. (Defendants' brief, p 6). A reasonable person could find their actions "distressing." He could feel "frightened, intimidated, threatened, etc." by the discovery that he was being followed once by a man wearing dark glasses and again by two men in two cars for an entire day – particularly when he had no idea what interest they had in him.

Plaintiff never knew *why* he was under surveillance. In his initial meeting with Conley, the detective specifically denied following plaintiff. (Henderson report, p 5; App, p 84a.) When Conley's vehicle showed up again later, then, plaintiff was put in an untenable position: he was being followed by someone who expressly denied following him and he had no explanation for the phenomenon.

Defendants' actions can be described, at best, as clumsy – "just Keystone cops bad," in Judge Stephens' words. Dr. Quinn, too, viewed the detectives as incompetent. (Quinn deposition, p 101; App, p 153b.) Activities that would not be actionable if carried out skillfully may nonetheless be tortious in incompetent hands. For example, police officers have the authority to employ force in making arrests, but an officer who bungles an individual seizure may still face a § 1983 action. Similarly, that officer's employer may be liable in a civil rights claim if it has failed to provide him or her with adequate training in carrying out the job without undue danger to the public.

Here, the issue is not merely whether plaintiff was entitled to feel distressed at the discovery that he had been followed about his daily activities. Defendants seem to propose that "trailing" a subject in a public place can *never* amount to "contact that would cause a reasonable individual to suffer emotional distress." Plaintiff disagrees even with that premise, as there are

certainly circumstances under which ordinary surveillance might be enough to provoke distress.[18] The Henderson agents, however, went beyond merely "observing" plaintiff.

Once plaintiff realized he was being followed and tried to "shake" the detectives, they began, in effect, to chase him. In the first incident, plaintiff deliberately made several wrong turns on his way to the clinic, but Conley's car stayed behind him. In the second affair, two different cars followed plaintiff on the highway. And in the final confrontation, one car "came after" plaintiff in the parking lot of Montgomery Ward's and stopped in front of him. When plaintiff reentered his own vehicle and drove off, two cars followed him, going through a yellow light and making an illegal right turn. A reasonable person could well find this conduct upsetting.

The Court of Appeals analysis was:

> Under the circumstances and facts of this case, we conclude that the question whether plaintiff's feelings of being harassed were reasonable was one for the factfinder, not the trial court. . . .
>
> [D]efendants present nothing to this Court to establish that the element of "emotional distress" could not be met because plaintiff confronted Conley in the first surveillance or attempted to take down the license plate numbers of the vehicles driven by Conley and Stovall in the fourth surveillance. [Opinion, p 4; App, p 25a.]

e. Actually causing the victim to suffer emotional distress.

"'Emotional distress' means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." MCL 750.411h(1)(b).

There is no doubt that defendants' actions "actually caused" plaintiff emotional distress. Plaintiff himself testified extensively to the effect the surveillance had on him. Mrs. Nastal said

[18] Suppose, for example, that a bereaved parent were to be followed to the burial of her deceased child or that full-time observation were carried out for weeks on end.

that plaintiff was so upset after the June 30 incident that she had to come home and assist him. Mrs. Nastal and one of plaintiff's counselors both observed plaintiff "shaking" when he talked about the surveillance. Even Dr. Quinn, who had been retained by Citizens, also recorded the deleterious effects the surveillance had on plaintiff.

v. Defendants actually caused plaintiff to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

There is extensive evidence that plaintiff felt "terrorized," or "frightened" by defendants' actions. He stopped walking, both in the park and around his neighborhood. For a long time, he kept the curtains of his house closed. He rarely goes out even now and continues to believe that he is being followed.

It should also be noted, too, that MCL 750.411h(4) includes a provision that:

> *In a prosecution for a violation of this section, evidence that the defendant continued to engage in a course of conduct* involving repeated unconsented contact with the victim after having been requested by the victim to discontinue the same or a different form of unconsented contact, *and to refrain from any further unconsented contact with the victim, gives rise to a rebuttable presumption that the continuation of the course of conduct caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.* Emphasis supplied.]

While the present case does not involve a "prosecution,"[19] the presumption is relevant to a determination of whether "the course of conduct caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested."

Plaintiff's response to the discovery that Conley was following him ("He called me a 'dick fuck,' swore. . . . [H]e was yelling . . ." (Conley deposition, p 43; App, p 89b) is certainly an indication that plaintiff wished the "contact" to be discontinued. So did his calling the police, both on June 30 and July 6. No reasonable private investigator would interpret these actions as

[19] There is no requirement that the defendant in a civil action have been convicted of a criminal offense. Thus, it is not "important[]" that "the appellants were neither charged nor convicted of the criminal act of stalking." (Defendants' brief, p 13.)

an invitation to continue to surveillance with the subject's consent. Plaintiff, then, could benefit from the presumption created by MCL 750.411h(4).

Finally, the definition of "harassment" in MCL 750.711h(1)(c) is not exclusive. The statute provides that the definition "includes *but is not limited to*" the enumerated behaviors. Even if defendants' action did not constitute "repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress," then, defendants might still be found to have engaged in "harassment" of plaintiff.

ARGUMENT II

THE COURT OF APPEALS DID NOT ERR IN HOLDING THAT THERE WAS A QUESTION OF FACT AS TO WHETHER DEFENDANTS' CONDUCT WAS "LEGITIMATE ACTIVITY."

(a)

Surveillance by a private investigator is not *per se* "legitimate."

i. Saldana *is distinguishable.*

Defendants rely heavily on *Saldana v Kelsey-Hayes Co*, 178 Mich App 230, 235; 443 NW2d 382 (1989). That case, however, is not dispositive of the present matter.[20]

First, *Saldana* was not a claim under the stalking statute, which had not yet been enacted, but a common law tort action. Second, *Saldana* represents a different factual situation. The plaintiff was injured at work and applied for worker's compensation benefits. His employer suspected he was malingering and hired an investigator. The detective took an number of actions, including observing the plaintiff, questioning a garbage collector and posing as a process server to gain access to his hose. The employee sued for invasion of privacy. A majority of the Court of Appeals affirmed summary disposition for the defendant, stating:

[20] It is notable that the Court of Appeals' opinion does not even cite *Saldana*.

> The defendants' duty to refrain from intrusion into another's private affairs is not absolute in nature, but rather is limited by those rights which arise from social conditions, including the business relationship of the parties. . . . Defendants' surveillance of plaintiff at his home involved matters which defendants had a legitimate right to investigate. . . Plaintiff's privacy was subject to the legitimate interest of his employer in investigating suspicions that plaintiff's work-related disability was a pretext. . . . Defendant also has a right to investigate matters that are potential sources of legal liability. . . . [178 Mich App 234-235. Citations omitted.]

Several important differences stand out between *Saldana* and the present case. First, in *Saldana*, the plaintiff alleged invasion of privacy, a rather nebulous common law cause of action, not a violation of a clearly-defined penal statute. Plaintiff here did not plead invasion of privacy in his complaint.

Second, the defendant in *Saldana* was the plaintiff's employer itself, not a third party. The plaintiff in *Saldana* did not even name the investigators themselves. Here, Henderson's "purpose" in investigating plaintiff was purely business – they were paid by the hour and motivated by the prospect of making a profit.

Third, plaintiff in the present case was not suspected of fraud. Even Penny Judd admitted that he had a valid claim. Citizens' decision to investigate plaintiff's "activities" was prompted entirely by the size of the mediation recommendation. Furthermore, it was questionable whether an "activities check" could reveal anything about plaintiff that Citizens did not already know. Plaintiff did not claim, for example, that he was unable to drive or that his ability to walk was limited by the accident.

Most significant, however, is the issue of how "legitimate" Henderson's actions were once the surveillance had been compromised. Conley, Henderson and Judd all conceded that the goal of surveillance is not to be seen. (Henderson deposition, pp 37, 68; App, pp 136b, 144b; Conley deposition, pp 15-16; App pp, 82b-83b; Judd deposition, p 61; App, p 73b.) Plaintiff

spotted Conley almost immediately on June 30, which Conley realized; he wrote in his report that plaintiff "performed maneuvers to detect and evade surveillance" shortly after 7:00 a.m. (Henderson report, p 6; App, p 85a.) Nonetheless, Conley continued to follow plaintiff until the confrontation in the parking lot at 8:00. On July 6, Stovall was approached by the Westland police at approximately 11:00 a.m. and "got the impression" that someone had called the police. Still, he and Conley continued their surveillance of plaintiff. And on July 31, despite another "detect and evade" episode, the two men continued to follow plaintiff, even to the point of committing two infractions of the motor vehicle code.

At the least, there is a question of fact as to whether, under the circumstances, the surveillance of plaintiff was for a "legitimate" purpose. Once the surveillance had been discovered, it was no longer serving a "legitimate" purpose. If defendants continued to follow plaintiff after they knew they had been discovered, it is a matter for the fact finder whether their actions were "legitimate" rather than intended to harass.

ii. This issue has not been resolved in other jurisdictions.

As noted *supra*, a number of state legislatures did not make any provision for conduct that, while fitting their statutory definitions of "stalking," might have been initiated with a purpose other than harassment of the victim or gratification of the perpetrator. The remainder, however, addressed this situation several different ways.

Many states approach the problem by simply eliminating "constitutionally protected activity" or its equivalent, from the definition of "stalking." See Ala Code 13A-6-92(c); Ark Code Ann 5-71-229(d)(1)(B)(i); Ariz Rev Stat Ann 13-2923(c)(1); DC Code Ann 22-404(b); Idaho Code 18-7906(2)(a); 17-A; Me Rev Stat 210-A(2)(A); Mo Rev Stat 565.225(1)(1); Miss Code Ann 97-3-107(4); Mont Code Ann 45-5-220(2); ND Cent Code 12.1-17-07.1(1)(a); RI Gen Laws 11-59-1(1); Tex Civ Prac & Rem Code 85.005; 14 VI Code Ann 2071(a). Six states and

one territory make separate or additional exceptions for activities, such as picketing or distributing handbills, associated with labor disputes. See, 9 Guam Code Ann 19.70(f); Ill Comp Stat Ann(c); Ind Code Ann 35-45-10-1; NJ Stat 2C:12-10(3)(f); Mo Rev Stat 565.225(1)(1); 18 Pa Stat Ann 2709.1(e); WVA Code 61-2-9a(h).

Another approach is to define "stalking" but provide that some types of conduct are not covered by the statute. Michigan's exception falls in this group.

Including Michigan, fourteen states use the word "legitimate" in some context. In New Hampshire, stalking does not include "conduct that was necessary to accomplish a legitimate purpose independent of making contact with the targeted person." NH Rev Stat Ann 633:3-a(II)(a). The Okalahoma statute provides that "[h]arassment does not include . . . conduct that serves a legitimate purpose." 21 Okla Stat Ann 1173 (F)(1). California, Kansas, Kentucky, Nebraska, New York, North Dakota, South Dakota and Vermont include in their definitions of the conduct underlying "stalking" that it "serves no legitimate purpose." Cal Penal Code 646.9(e); Kan Stat Ann 60-31a02(b); Ky Rev Stat Ann 508.130 (1)(a)(3); Neb Rev Stat 28-311.02(2)(a); ND Cent Code 12.1-17-07.1(1)(c); NY Penal Law 120.45; SD Codified Laws 22-19A-4; 13 Vt Stat Ann 1061(1)(A). North Carolina refers to "no legal purpose," NC Gen Stat 14-277.3(a), and Washington to harassment or following "without lawful authority." Wash Rev Code Ann 9A.46.110(1). Wisconsin, after describing a group of activities that fit the definition of "constitutionally protected," adds that the definition "does not limit the activities that may be considered to serve a legitimate purpose under this section." Wis Stat Ann 940.32(4)(b).

To date, construction of the "legitimate purpose" rule has been almost entirely limited to the question of whether it is unconstitutionally vague. Compare, e.g., *People v Tran*, 54 Cal

Rptr2d 650, 652-654 (Cal App, 1996) (statute not unconstitutional) with *State v Orton*, 904 P2d 179, 182 (Or App, 1995) (phrase is unconstitutionally vague).[21]

Defendants' case law on this subject is of minimal assistance. In the two criminal cases defendants cite, the language that defendants relies on is dicta. *People v Stuart*, 742 NYS2d 767 (NY App Div, 2002), involved a vagueness challenge to the state's statute by a defendant accused of following and harassing a young woman. The court affirmed the defendant's conviction, holding that the statute was not unconstitutionally vague, then added, "the investigatory work of a private detective or the collection efforts of a 'repo man'" would "be outside the stalking statute's intended reach." *Id.* That is, there was no need for the court to make any decision on the "investigatory work of a private detective" in order to reach its result.

Washington v Lee, 917 P2d 159 (Wash App, 1996), is analogous. Wash Rev Code Ann 9A.46.110(3) provides that "It shall be a defense to the crime of stalking that the defendant is a licensed private investigator acting within the capacity of his or her license . . ." The defendants in *Lee*, however, were not private investigators. They challenged the constitutionality of the law, alleging in part that the exception for private detectives violated the equal protection clause of the Fourteenth Amendment. The court held that the statute passed the "rational basis" test[22] because "[t]he statutory exemption . . . is presumably based on the Legislature's conclusion that these individuals pose relatively little threat of harm to the people they follow." 917 P2d 168.

Defendant also discusses *Johnson v Corporate Special Services, Inc*, 602 So2d 385 (Ala, 1992), but that case is not at all on point. It was a claim for invasion of privacy; there were no allegations of "stalking" and there was no need to construe any statutory language. Rather, the

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[21] A review of these cases is outside the scope of this brief, but the Oregon position is definitely in the minority.

[22] *Glona v American Guarantee & Liability Ins Co*, 391 US 73, 76 (1968).

court held that the detective's surveillance of the plaintiff was not "wrongful," because he "could have been observed by any passerby." 602 So2d 388.

Only one case has examined the "legitimate purpose" language in a context even remotely like the present. In *Curry v State*, 811 So2d 736 (Fla App, 2002), the defendant was involved in a long-standing feud with a former neighbor. She obtained the equivalent of a personal protection order against him. He then "filed about forty complaints against her with various government agencies." *Id.* at 740. He was eventually convicted of "aggravated stalking," but the Court of Appeal of Florida reversed. "A report to an arm of government, concerning a matter within the purview of the agency's responsibilities, serves a 'legitimate purpose' within the meaning of section 784.048(1)(a), regardless of the subjective motivation of the reporter." 811 So2d 741.

Curry, obviously, is quite different from the present case. While the defendant was an individual, and appeared to have a personal motive for his behavior, he nonetheless acted through the legitimate channels for enforcement of local health and safety laws. As much as he may have annoyed the target of his campaign, he did create a benefit to the public. No corresponding result can be identified here.

iii. Surveillance by private investigators can be tortious conduct.

No case decided under a state "stalking" statute has involved facts quite like those of the present situation. Some out-of-state opinions in situations not controlled by statute, however, are of interest.

Pinkerton National Detective Agency, Inc v Stevens, 132 SE2d 119 (Ga App, 1963), is the most factually similar. Stevens had sued a driver for mental and other injuries as a result of an accident. The driver's insurance company hired Pinkerton, which allegedly conducted a lengthy and rather invasive surveillance of the plaintiff. It was four months before she found out who the

men shadowing her were and the surveillance was not discontinued even then, despite a promise from the insurer's attorney. She sued the detective agency, which moved for summary judgment. The Georgia Court of Appeals held that the plaintiff had stated a claim for invasion of privacy. The court concluded that the defendants went beyond the "legitimate purpose" of investigating the plaintiff's injuries:

> This petition [complaint] does not limit the defendants' acts to that reasonable and unobtrusive observation which would ordinarily be used to catch one in normal activities unaware, but *sets out a course of conduct beyond what would be sufficient for the purpose intended*, and certainly one which would disturb an ordinary person without hypersensitive reactions. [132 SE2d 125. Emphasis supplied.]

Ellenberg v Pinkerton's, Inc, 188 SE2d 911 (Ga App, 1972) is also of interest. The plaintiff filed a worker's compensation claim and his employer hired Pinkerton's to investigate him. He sued and the court held that whether the investigator's actions were "reasonable" was "a question remaining for jury determination . . ." *Id.* at 914.[23]

In *Nader v General Motors Corp*, 255 NE2d 765 (NY, 1970), the plaintiff alleged that, among other things, the defendant's agents "kept him under surveillance in public places for an unreasonable length of time." 255 NE2d 767. He sued in New York, but the court applied the law of the site of the action, the District of Columbia, which recognized "intrusion on seclusion" as a form of invasion of privacy. *Id.* at 768.

The court held that the plaintiff had stated a claim:

> [U]nder certain circumstances, surveillance may be so "overzealous" as to render it actionable. . . . Whether or not the surveillance in the present case falls into this latter category will depend on the nature of the proof. . . . [255 NE2d 771. Citations omitted.]

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[23] In a later appeal, however, the court found the surveillance actually carried out was "reasonable." *Ellenberg v Pinkerton's, Inc*, 202 SE2d 701 (Ga App, 1973).

In another case with a high-profile subject, *Galella v Onassis*, 487 F2d 986 (CA2, 1973), the plaintiff was a photographer who had been following Jacqueline Onassis and her children. He became intrusive enough to be arrested by the Secret Service. He then sued Onassis, alleging false arrest, malicious prosecution and other torts. She counterclaimed for invasion of privacy and several additional causes of action, including "harassment" under a New York statute (NY Penal Law 240.25.) The trial court found for Mrs. Onassis on the counterclaim and also entered an injunction against the photographer. The Second Circuit affirmed, agreeing that the plaintiff was liable for "harassment" and had committed an invasion of Onassis' privacy. 487 F2d 994-995.

In an older case, *Schultz v Frankfort Marine, Accident & Plate Glass Insurance Co*, 139 NW 386 (Wis, 1913), the plaintiff alleged that the defendant had hired private detectives to try to intimidate him into leaving Milwaukee, so that he could not appear as a witness in a trial. The detectives were instructed to use a technique called "rough shadowing," that is, open following of the subject so that he knew he was being watched. 139 NW 388. The detectives engaged in conduct that would be unacceptable today, such as entering the vestibule of the apartment house where the plaintiff lived and trying to listen at the doors.

The plaintiff sued, although his theory of liability was not very clear, and the trial judge directed a verdict against him. On appeal, the court held that, even disregarding the allegations of trespass and eavesdropping, the plaintiff had stated a claim. 139 NW 390. The defendants offered something of a "legitimate purpose" defense, which the court soundly rejected:

> Defendants attempt to justify by stating that their purpose was to prevent plaintiff leaving town until they had determined whether or not to have him arrested. This in itself is not a lawful purpose. The defendants are not public officers. So far as the enforcement of the criminal laws is concerned they have no duties except those common to all private citizens.
>
> * * *

> [S]o long as the law is just and impartial we cannot accept the testimony of the defendants here as justification, unless we are ready to concede that any person or corporation may employ private detectives for the purpose of openly and continuously following and watching another person, and any private detectives in pursuance of such employment may openly and publicly follow and watch a man and commit the acts which the evidence here tends to show were committed. *It is hardly necessary to say that this extraordinary privilege is not possessed by any private person at common law*, and, as we have seen, the attempted exercise thereof constitutes a legal injury to reputation. [139 NW 390-391. Emphasis supplied.]

Defendants present several other state court decisions in support of their position, but they are not very informative.

In *Figured v Paralegal Technical Services, Inc*, 555 A2d 663 (NJ Super Ct App Div, 1989), *certification granted* 564 A2d 847 (1989), *certification dismissed* 583 A2d 350 (1990), the defendants, investigating an auto accident claim, followed the plaintiff's car on two occasions. She alleged invasion of privacy and intentional and negligent infliction of emotional distress. The court held that the surveillance was not an "unreasonable intrusion upon [the plaintiff's] seclusion" and affirmed summary disposition for the defendants. 555 A2d 667.

The plaintiff in *Forster v Manchester*, 189 A2d 147 (Pa, 1963) became very distressed when she realized she was being followed; the defendant was a private investigator who was retained to investigate her after an auto accident. She sued for invasion of privacy and intentional infliction of emotional distress. The court decided that she could not maintain a claim for either tort. 189 A2d 150-152.

The only reasonable conclusion is that the conduct of private investigators will sometimes be found to constitute the commission of a tort while, under other circumstances, it

will not. Just as a physician's act may become an assault[24] or a lawful arrest may be made with excessive force, a private detective may overstep the boundaries of social utility.

There is no single rule to be derived from the case law. Each matter must be decided on its own facts and circumstances.

iv. Common law tort actions alone would not provide individuals like plaintiff here with an adequate remedy.

Defendant suggests that "[p]rivate investigators are still bound by common law claims of assault and battery, invasion of privacy, and intentional infliction of emotional distress, along with the parameters of the Private Detective License Act of 1965 . . . whenever these investigators conduct surveillance or other activities outside the scope of their profession." (Defendants' brief, p 21.) This, apparently, is supposed to mean that potential plaintiffs do not need any other source of recourse against conduct by private investigator. Defendants' analysis, however, is incorrect.

1. Assault and battery. "An assault is 'any intentional unlawful offer of corporal injury to another person by force, or force unlawfully directed toward the person of another, under circumstances which create a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish the contact.'" *Smith v Stolberg*, 231 Mich App 256, 260; 586 NW2d 103 (1998) (quotation omitted). Battery is "the wilful and harmful or offensive touching of another person which results from an act intended to cause such contact.'" *Id.* If there is no physical contact between the private investigator and the subject, there obviously cannot be a "battery." Similarly, unless the detective actually threatens the subject with "imminent contact," he cannot be liable for assault, no matter how much distress his presence may be causing the person observed.

[24] See, e.g., *In re Rosebush*, 195 Mich App 675, 680; 491 NW2d 633 (1992), citing *Zoski v Gaines*, 271 Mich 1, 10; 260 NW 99 (1935).

2. Invasion of privacy. "The intrusion-into-seclusion theory of privacy[25] requires the plaintiff to establish the following three elements: (1) the existence of a secret and private subject matter, (2) a right possessed by the plaintiff to keep that subject matter private; and (3) the obtaining of information about that subject matter by the defendant through some method objectionable to the reasonable man." *Lansing Ass'n of School Administrators v Lansing School Dist Bd of Education*, 216 Mich App 79, 87; 549 NW2d 15 (1996). Even intrusive surveillance, such as that plaintiff experienced in the present case, cannot be described in these terms.

3. Intentional infliction of emotional distress. The elements of intentional infliction of emotional distress are "(1) extreme and outrageous conduct (2) intent or recklessness (3) causation, and (4) severe emotional distress." *Graham v Ford*, 237 Mich App 670, 674-675; 604 NW2d 713 (1999). Intentional infliction of emotional distress is a notably difficult cause of action to sustain. The "extreme and outrageous conduct" prong is almost impossible to satisfy. A review of the case law on this subject is outside the scope of this brief, but it is very rare for a plaintiff in Michigan to be permitted to pursue an intentional infliction claim.

4. The private detective license act. MCL 338.821-MCL 338.851 constitutes "the 'private detective license act.'" MCL 338.821. It is exactly that, a *licensing* act. It provides for the licensure and regulation of private detectives and private detective agencies. With the exception of §20 (MCL 338.820), which prohibits private detectives from "divulging" information obtained in the course of their work or making false reports, it contains nothing at all about how the detectives, once licensed, should do their jobs.

Defendants' proposed remedies, then, would not be of assistance to plaintiff or others situated in like positions.

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[25] There are other forms of invasion of privacy, but they are not relevant to the present discussion. See *Lewis v LeGrow*, 258 Mich App 175, 193; 670 NW2d 675 (2003).

(b)

Defendants' arguments mischaracterize both the nature and the effect of the lower courts' holdings.

i. The Court of Appeals did not say that the discovery of surveillance will necessarily create a potential cause of action for stalking.

Webster defines "straw man" as "a weak or imaginary opposition (as an argument or adversary) set up only to be easily confuted." Webster's Ninth New Collegiate Dictionary, p 1165. As this Court noted in *Cruz v Chevrolet Grey Iron, Division of General Motors Corp*, 398 Mich 117; 247 NW2d 764 (1976):

> Neither the WCAB nor the Court of Appeals based its decision on the avoidance of dual benefits argument. Defendant has not proposed such an argument. In this issue, it appears as a 'straw man' set up by plaintiff to be destroyed by plaintiff. [398 Mich 134.]

Throughout the appellate stages of this matter, defendants have persisted in employing a "straw man" fallacy. Defendants' brief on appeal is full of claims that the trial court and the Court of Appeals held that the subject of a private investigator's surveillance will instantly develop a cause of action under the stalking statute if he discovers that he is being followed. This is simply not true.

What the Court of Appeals actually said was:

> Defendants fail to address on appeal the fact that the trial court determined that the surveillance initially served a legitimate purpose but that a genuine issue of material fact as to its legitimacy arose when the second and fourth surveillance activities continued after plaintiff discovered that he was followed. Defendants Conley and Stovall and their supervisor, Gregory Henderson, all testified that once the subject of the surveillance discovered that he was being followed, the surveillance activity served no purpose and should be discontinued. [Opinion, pp 4-5; App pp 25a-26a.]

The Court of Appeals did not hold that "even if the investigators continue to follow the subject for one second after being discovered, an issue of fact exists on whether this legitimate activity suddenly turns into a claim of stalking" (defendants' brief, p vii); that the right to

investigate a personal injury claim "is effectively circumvented . . . any[]time a subject discovers that he is under surveillance" (defendants' brief, p 19); or "whether the investigator should have left in 1 second, 1 minute or 1 hour, it does not matter as it will always be up to the jury to determine if this previously legitimate activity of surveillance now rises to the level of stalking" (Defendant brief, p 31).

The events that led to the suit must be viewed in context, and in sequence. Plaintiff had a "head injury." There was no dispute that he had a legitimate claim; there were no allegations of fraud or malingering involved. That is, Citizens was not afraid that it might have to pay a person who had no right to compensation. Citizens was only concerned that it might have to pay more than it had expected to.

A review of the facts, which are not disputed, shows that:

1. In the first surveillance, plaintiff discovered he was being followed. He confronted Conley. Conley lied to him. Plaintiff became very upset.

2. In the second surveillance, Plaintiff's car was followed by not one but two other vehicles as he went to his doctor's appointment. Both cars followed him home. Mrs. Nastal decoyed one of them, to establish that her husband was actually being followed. Defendants were questioned by the police.

3. In the fourth surveillance, two investigators followed plaintiff's car. He discovered he was being followed. One investigator followed him inside a store. There was another near-confrontation in the parking lot. Both investigators followed plaintiff's vehicle when he left, although they knew he was aware of the surveillance.

Plaintiff discovered he was under surveillance once. It was clear to a reasonable observer that he was upset about it. He swore at the detective and wrote down his license plate number. The police were called, presumably in response to plaintiff's concerns about what had happened..

Defendants performed another round of surveillance. Even if the investigators did not know they had been discovered when they followed plaintiff's car downtown and back again,

they certainly realized what had happened after Mrs. Nastal disguised herself as her husband and fooled them into following her around the block. The police were also called again.

Defendants went onto a third episode. That time, plaintiff stayed inside all day. By this point, it would have been apparent that a) plaintiff's "activities" were mundane – drinking coffee, visiting doctors, staying at home and; b) he detected surveillance readily and became agitated when he found out he was being followed.

Nonetheless, defendants opted for another attempt at vehicular observation. The same agents, in the same cars plaintiff had quickly spotted in the prior incidents, tried the same thing all over again. When plaintiff spotted them, again, and confronted them, again, they persisted, again, virtually chasing him out of the mall parking lot and into the park.

What Judge Stephens said in ruling on the original motion was:

> On one hand the interpretation could be made that it was just Keystone cops bad, but still for legitimate purpose of something or another, not for the ultimate purpose which is to surreptitiously observe an individual and determine whether or not they are filing a false claim, but perhaps for at least the purpose of – some other purpose that they may speak to.
>
> On the other hand, *there's an interpretation that the legitimate purpose had been abandoned in favor of an illegitimate purpose of harassment. The court simply does not know and will leave that to the trier of fact to determine.* And it is on that basis alone, *the continuation of the surveillance, of the surveillance after compromise*, and there are only three instances where that is know, *that the issue of whether or not Henderson through its employees is, in fact, subject to liability can be presented to the trier of fact.* [Tr I, pp 35-37; App, 70a-72a. Emphasis supplied.]

This Court should not be misled by defendants' overstated version of the lower courts' decisions. Bad private detecting can, sometimes, cross the threshold from "legitimate" activity into the realm of harassment. It is up to a jury of reasonable members of plaintiffs' community to decide whether that happened here.

ii. A single act of surveillance can never satisfy the "course of conduct" requirement of the stalking statute.

MCL 750.411h(1)(d) defines "stalking" as "a willful course of conduct . . ." A "course of conduct" is as "a pattern of conduct composed of a series of 2 or more separate noncontinuous acts . . ." MCL 750.411h(1)(a).

In order to state a claim for stalking, then, the plaintiff must show that the defendant engaged in "2 or more separate noncontinuous acts. . ." Defendants' statements that "the Court of Appeals ruled that a civil action for stalking may be brought against an private investigator who continues his surveillance after the subject discovers he is being followed" (defendants' brief, p v); "[u]nder the lower courts' rulings this right [to investigate a personal injury claim] is effectively circumvented by the appellee's claim that such investigation may amount to stalking, any[]time a subject discovers that he is under surveillance" (defendants' brief, p 19); and the like, then, are simply unsupportable.

One episode of surveillance, no matter when it was discovered nor how long it was continued, could never constitute a "course" of conduct. *Pobursky*, *supra*, 249 Mich App 44. It would be merely one "continuous" act. Only if the investigator handled the case so poorly that he was spotted not once but twice, or more, could the subject have even the beginnings of a stalking claim.

No one in this case has said that plaintiff's cause of action arose during the first surveillance. It could not; there had not yet been any "course of conduct," because plaintiff had only been followed, and discovered that he was being followed, a single time. It took the second and third series of events before defendants' conduct could begin to fit the definition of "harassment" under the statute.

iii. The statute requires unconsented "contact" with the defendant.

Finally, the definition of "harassment" refers to "repeated or continuing unconsented *contact*" with the defendant. MCL 750.411h(1)(c) (emphasis supplied). Notably, it does not require that the "contact" be initiated by the defendant.

In the present case, there clearly was "contact" between plaintiff and defendants in the first and fourth episodes and, arguably, during the vehicular portion of the second. But a subject who simply notices a detective in a car outside his house, or following him on foot in a public place, will not have a stalking claim no matter how often he discovers the observer.

ARGUMENT III

DEFENDANTS' PUBLIC POLICY ARGUMENT IS NOT PERSUASIVE.

Defendants present a series of alleged reasons that the Court of Appeals' opinion in this case represents bad public policy. (Defendants' Argument IV.) A point-by-point dissection of this rhetoric will expose its weaknesses.

1. "Surveillance = stalking." Defendants assert that "[I]f Appellee's lawsuit goes forward the Court is essentially sending the message that mere surveillance is tantamount to stalking." (Defendants' brief, p 33.) The Court of Appeals' opinion does not stand for this proposition. The most that can be said is that the court agreed that repeated episodes of bungled surveillance *might* amount to "stalking." In addition, the stalking law would not even be implicated unless there was a "course" of conduct, i.e., two or more separate instances. See *supra* at Argument II(b)(ii).

2. Suits against private investigators. Defendants accuse the Court of Appeals of opening "a Pandora's [b]ox of lawsuits against private investigation companies . . ." (defendants' brief, p 33) or releasing "a flood[] of frivolous litigation" (defendants' brief, p vi). These assertion overlooks several important points.

First, in order to maintain a cause of action under the statue, the victim must *know* that he or she has been "stalked." Surveillance by private investigation is, by definition, intended to be carried out without the subject's awareness of it. Second, as noted above, there must be a least two incidents of "unconsented contact" with the victim before the surveillance can possibly become "stalking" under Michigan law. A careful private investigator, then, is not likely to be subject to suit under the statute, since he is unlikely to be observed even once, let alone two or more times. For that matter, a private investigator who is unable to avoid detection on two separate occasions may well have made a poor choice of profession and appropriately be subject to sanction for causing harm to another person.

Finally, the court should recall that private investigators can be sued even under the present state of the law, if their conduct crosses the line into invasion of privacy. Indeed, proof of the tort does not require that the plaintiff have suffered "emotional distress" under a "reasonable person" standard. See, e.g., *Lansing Ass'n of School Administrators*, *supra*, 216 Mich App 87.

3. Suits against insurance companies and law firms. Defendants argue that not only private investigators but "the insurance companies and law firms" that hire them will be inundated with claims if the Court of Appeals decision is allowed to stand. (Defendants' brief, p 32.) MCL 600.2954, however, provides that "[a] victim may maintain a civil action against *an individual who engages in* conduct that is prohibited under [MCL 750.411h and MCL 750.411i] . . ." (emphasis supplied). There is no provision under the statute for a cause of action based on "stalking by agency." The claim against Citizens in the present case, for example, was that it "set out to intimidate and harass the plaintiff by hiring [Henderson] to follow him and mak[e]

their presence known during their 'investigation/stalking/harassment' of the plaintiff" and was negligent in hiring Henderson and Associates. (Complaint, ¶¶ 9, 15; App, pp 31a, 32a.)

4. "Outlawing" private investigation. Defendants suggest that the Court of Appeals opinion "[i]n practical effect, . . . will be outlawing all private investigation in the State of Michigan." (Defendants' brief, p 33.) Courts, of course, cannot "outlaw" behavior; that is the role of the Legislature. Even apart from that problem, the Court of Appeals' decision does not "outlaw all private investigation" in Michigan. It does require that private investigators carry out their assignments with sufficient care that they not inadvertently harass their subjects, but, as has been said several times already, that is no more than what a good private investigator would plan to do anyway. A private investigation firm that became known for repeatedly "compromised" surveillance missions is not likely to see its business flourish. [26]

Defendants' additional arguments on this point also do not hold up. To maintain that "[A]ny time an investigation is discovered . . . the investigation must cease immediately or a potential cause of action for stalking would arise at that point" (defendants' brief, pp 31-32) and "[a]ppellants will essentially be prevented from investigating the validity of personal injury cases for fear of being sued and/or arrested for stalking" (defendants' brief, p 32) ignores the facts that reasonable surveillance is not at issue. Private investigators should take care when observing claimants, but the Draconian interpretation of the Court of Appeals' opinion that defendants seek to impose is not valid.

Finally, investigative reporters (defendants' brief, p 33) are in a different category altogether. A television crew based on the Mike Wallace/*60 Minutes* model engages in conduct

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[26] Defendants' contention that "[t]he Court of Appeals' decision has effectively paralyzed the private investigation industry as a whole" (defendants' brief, p 9) is offered with no citation to any source.

that is actually intended to "harass" the subject, although its intent is to benefit society at large. Reporters consciously run the risk of liability, as part of their public service function. Undercover reporters, on the other hand, are governed by the same principles as private investigators. They have no desire to be discovered and so would be unlikely to be seen. The "contact" element, therefore, would be missing and they could not be perceived as "stalkers."

RELIEF REQUESTED

Plaintiffs Ronald Nastal and Irene Nastal, through their attorney Sheldon L. Miller & Associates, P.C., respectfully ask this honorable Court AFFIRM the October 23, 2003 opinion of the Court of Appeals.

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July 30, 2004